619675

619675

84152-7

NO. 61967-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DETENTION OF ROBERT DANFORTH

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DANFORTH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
The Honorable Charles Mertel, Judge

APPELLANT'S OPENING BRIEF

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENT OF ERROR 3

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 3

D. STATEMENT OF THE CASE 5

E. ARGUMENT 13

AS A MATTER OF LAW, MR. DANFORTH DID NOT COMMIT A RECENT OVERT ACT. 13

a. Due Process requires the State to prove a "recent overt act" before an individual may be committed as a sexually violent predator. 14

b. Mr. Danforth's statements do not constitute a "threat" within the meaning of the statute 16

c. Unless limited to true threats, the statutory amendment extending the definition of "recent overt act" to encompass threats is unconstitutionally overbroad. 22

d. If the "threat" prong of the recent overt act statute can be applied to Mr. Danforth's statements, the statute is unconstitutionally vague. 24

F. CONCLUSION 27

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Bellevue v. Lorang, 140 Wn.2d 19, 992 P.2d 496 (2000).. 22, 25, 26

City of Bellevue v. E. Bellevue Cmty. Council, 138 Wn.2d 937, 983 P.2d 602 (1999)..... 16

Harry v. Buse Timber & Sales, Inc., ___ Wn.2d ___, 201 P.3d 1011 (2009)..... 17

In re Detention of Albrecht, 129 Wn. App. 243, 118 P.3d 909 (2005) 25, 26

In re Detention of Albrecht, 147 Wn.2d 1, 51 P.3d 73 (2002)..... 14

In re Detention of LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986). 17

In re Detention of Lewis, 163 Wn.2d 188, 177 P.3d 708 (2008)... 16, 19, 26

In re Detention of Young, 122 Wn.2d 1, 857 P.2d 989 (1993). 14, 15

In re Harris, 98 Wn.2d 276, 654 P.2d 109 (1982)..... 14, 15

In re Personal Restraint of Sappenfield, 138 Wn.2d 588, 980 P.2d 1271 (1999)..... 16

State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006)..... 23

State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004)..... 23, 24

State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001)..... 22, 23

Washington Court of Appeals Decisions

Anica v. Wal-Mart Stores, Inc., 120 Wn. App. 481, 84 P.3d 1231 (2004)..... 13

Crane & Assoc. v. Felice, 74 Wn. App. 769, 875 P.2d 705 (1994) 13

In re Detention of Anderson, 134 Wn. App. 309, 139 P.3d 396 (2006) 17, 18

In re Detention of Broten, 130 Wn. App. 326, 122 P.3d 942 (2005) 20

In re Detention of Davis, 109 Wn. App. 734, 742, 37 P.3d 325 (2002) 17

United States Supreme Court Decisions

Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972) 14

Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) 19

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) 19

NAACP v. Claiborne Hardware, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) 24

Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) 22, 23

Constitutional Provisions

U.S. Const. amend. I ..... passim

U.S. Const. amend. XIV 14

Statutes

Laws of 1995, ch. 216, § 1 15

Laws of 1995, ch. 216, § 3 15

Laws of 2001, ch. 286, § 4 16

RCW 71.05.020 15

RCW 71.05.050 18

RCW 71.09.020 ..... 13, 16, 20

Senate Bill Report, SB 5122 18

Other Authorities

Webster's Third New International Dictionary (2002) 17

A. INTRODUCTION

Robert Danforth is a 63-year-old mildly mentally retarded man who has lived for 10 years in the community crime-free after serving a period of incarceration for second-degree rape. Because of his "strange looks and behavior," he has always been subjected to ridicule and harassment. Desperate for relief, he has repeatedly requested incarceration or civil commitment as a form of refuge. In 1987, he asked a law enforcement officer to "write him up for anything" so he could go to jail. In 2002, he called the prosecutor's office and claimed he was dangerous and needed to be civilly committed. The authorities did not act upon this request, and Mr. Danforth continued to live in the community without committing crimes.

In 2006, he again sought refuge after his house was pelted with raw eggs and a bag of burning feces was left on his porch. He went to the Sheriff's Office at the Regional Justice Center and asked to be committed, saying he had had a dream that he was 13 years old and having sex with another 13-year-old, and that the dream scared him. When the detective asked him what he would do if the mental health professionals he called could not help him, he said he would go to an arcade and "rub up against" teenaged

boys. Two mental health professionals spoke with Mr. Danforth, but declined to commit him or help him obtain voluntary inpatient treatment.

The detective placed Mr. Danforth in jail, and the King County Prosecutor petitioned for Mr. Danforth's commitment as a sexually violent predator. The prosecutor alleged that Mr. Danforth's statements to the detective and mental health professionals constituted a "recent overt act." Mr. Danforth moved for summary judgment, arguing that his statements did not constitute a recent overt act as a matter of law. The trial court denied the motion, and Mr. Danforth stipulated to being a sexually violent predator in order to appeal the summary judgment order.

The order denying summary judgment should be reversed because as a matter of law, Mr. Danforth's requests for help do not constitute a "recent overt act." Under the plain language of the statute, as well as the "true threat" limitation required by the First Amendment, his statements were not threats. If they were, the statute is void for vagueness. Finally, as a matter of policy, former sex offenders who seek help to avoid reoffending should be assisted with voluntary treatment, not incarcerated as sexually violent predators.

B. ASSIGNMENT OF ERROR

The trial court erred in denying Mr. Danforth's motion for summary judgment because as a matter of law Mr. Danforth did not commit a recent overt act.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. "Recent overt act" means "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." A threat is an expression of an intention to inflict harm on another. Robert Danforth, a former sex offender who had lived in the community crime-free for a decade, walked into the Regional Justice Center and asked to be committed because he had had a dream involving 13-year-old boys and feared he would go to a video arcade and "rub up against boys" if the authorities did not help him. Instead of helping him, the State petitioned for his commitment as a sexually violent predator, alleging that his statements at RJC constituted a recent overt act. Mr. Danforth moved for summary judgment, arguing that as a matter of law the statements did not constitute a recent overt act. Did the trial court err in denying the motion for summary judgment?

2. A statute is overbroad under the First Amendment if it prohibits threats but does not limit the prohibition to "true threats," which are statements expressing an intention to inflict bodily harm or take the life of a specific individual or group of individuals. In 2001, the Legislature amended the definition of "recent overt act" in the SVP statute to include not only "acts" but also "threats". The trial court construed the amendment to apply to Mr. Danforth's statements that he wanted help so he could avoid harming teenaged boys. Is the statute, as construed by the trial court, unconstitutionally overbroad?

3. A statute is void for vagueness under the Due Process Clause and the First Amendment if it either (1) does not define its terms with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) does not provide ascertainable standards to protect against arbitrary enforcement. Is the "threat" prong of the "recent overt act" definition unconstitutionally vague because it does not provide sufficient notice that a request for help like Mr. Danforth's will be considered a threat?

D. STATEMENT OF THE CASE

Robert Danforth survived a horrific childhood during which his parents beat him, locked him in the basement, and made him wear dresses and answer to the name "Roberta". CP 69, 355, 380. He has been diagnosed with fetal alcohol syndrome and borderline mental retardation. CP 335, 338, 356. Because of "odd behaviors and looks," he has always suffered from harassment. CP 380.

As an adult, Mr. Danforth committed indecent liberties in 1972 and was convicted of second-degree rape in 1993 for events alleged to have occurred in 1987. CP 300-01, 345. Following the latter conviction, he was sentenced to 34 months' confinement based on an offender score of one. CP 301-02.[1] The psychologist hired by the State to perform a presentence investigation recommended "a minimal period of incarceration and a long term plan for community advocacy with an active case manager and an ongoing therapeutic relationship with someone who can provide clear feedback." CP 327. The psychologist had a long history with Mr. Danforth, and noted that "in the 14 years she had worked with

[1] Mr. Danforth has always adamantly maintained his innocence with respect to the second-degree rape charge, and even the psychologist hired by the State to perform the presentence investigation "did not believe he could have committed the crime." CP 326-27. He was nevertheless found guilty following a jury trial. CP 326.

him, she had never had any reason to believe that he was a threat to society and considered the reverse to be true." CP 328, 357.

Following his release in 1996, Mr. Danforth lived in his own home in the community and committed no crimes. CP 71. But he was the victim of repeated harassment from neighbors who poisoned his dogs, threw eggs and toilet paper at his house and left burning feces on his doorstep. CP 374, 383.

In 2002, Mr. Danforth called the King County prosecutor's office and asked to be civilly committed. CP 317, 364. He told the prosecutor and the State's psychologist that he felt he was a danger, lacked control, and was afraid of victimizing someone else soon. CP 318, 365. He said he thought about committing a crime if papers were not filed to commit him. Mr. Danforth did not "even want to think about it, he need[ed] to be in a place where he [could] be safe, and [did] not want to take a chance on offending with someone." He "indicated there are places where he could do it and it would be unwise not to put him in a facility." Mr. Danforth stated "he has tried everything he can and was going to do something crazy." He "scream[ed] out for help to keep from doing anything." CP 318, 365.

Although the State hired psychologist Charles Lund to evaluate Mr. Danforth, it declined to seek Mr. Danforth's commitment under either RCW ch. 71.05 or RCW ch. 71.09. Dr. Lund noted, "It is clear that [Mr. Danforth] has engaged in marginally appropriate sexual encounters with adults during the period he has been at large in the community, but there is no direct evidence of inappropriate overtures toward minors or self-reported involvement of sexualized encounters with minors." CP 324. Dr. Lund concluded, "the act of requesting to be committed under RCW 71.09 in and of itself does not create a reasonable apprehension of harm of a sexually violent nature," and therefore does not constitute a recent overt act. CP 324, 370.

Dr. Lund noted that Mr. Danforth "functioned adequately in the community for a substantial period of time following his release from prison, and it would appear that he could function adequately again in the community with increased social and mental health supports, including provisions for short-term psychiatric hospitalization at times he is in crisis." CP 370. Dr. Lund stated he "would definitely support any effort to utilize more traditional mental health interventions that might be available under RCW 71.05 and would strongly recommend the development of additional social

and mental health supports to assist Mr. Danforth at any future times of crisis." CP 324.

The prosecutor's office did not help Mr. Danforth obtain short-term psychiatric hospitalization or voluntary inpatient treatment under RCW ch. 71.05, and instead told him he needed to perpetrate some offense in order to be committed. CP 318, 365. Despite this advice, Mr. Danforth refused to commit another offense. He continued to live in his home for another four years, and remained crime-free. CP 71.

In October of 2006 Mr. Danforth again sought refuge from his hostile community environment by asking the King County Sheriff's Office to commit him. CP 310-11. That month, his house had been pelted with raw eggs and someone had put a burning bag of feces on his front porch. CP 383. Mr. Danforth went to the Regional Justice Center on October 25, asked to speak with a detective, and said, "I feel like re-offending. I have a desire to, I want to, I have a driving need to do it. I don't trust myself." CP 311. When the detective asked him "who he was thinking of offending against," he said he was interested in 13-14 year old boys. He explained that he had had a dream the previous night in which he was 13 years old and he had a sexual relationship with

another 13-year-old boy. He told the detective that this kind of desire is dangerous and that he needed to be in a facility permanently. CP 311, 393.

The detective asked two mental health professionals from King County Crisis and Commitment Services to speak with Mr. Danforth. CP 311. Mr. Danforth told them that he needed to be committed because he desires children sexually. He said, "If I'm not locked up, I could re-offend." CP 393. According to the detective, Mr. Danforth said he "thought of going by a school today, but did not want to, since he did not trust himself." CP 311, 393. The mental health professionals noted, presumably referring to the 2002 communication, that "patient has called with this before but never walked in." CP 412.

The detective asked Mr. Danforth what he would do if the mental health professionals said there was nothing they could do to help him. CP 391. Mr. Danforth responded that he would go to a video arcade and "rub himself against the back" of a teenaged boy. CP 392. He said, "If he liked it I might pursue more." CP 392.

The mental health professionals reported that Mr. Danforth "said he nearly went to South Center to the arcade but came here for help instead." CP 413. Mr. Danforth told them he had not had

urges for 14 years but the dream regarding 13 year-old-boys frightened him and made him feel he was losing control. CP 414. The mental health professionals said Mr. Danforth also expressed concern about dementia, because he had left the water running once and also caught himself "zoning out" while standing in the grocery store with a shopping cart. CP 414.

But the mental health professionals declined to help Mr. Danforth. CP 394. In fact, they decided they would not even admit him for a 72-hour mental health evaluation. CP 391-92. They told the detective that Mr. Danforth does not have symptoms that would allow for civil commitment. CP 415. The detective thanked the mental health professionals and told them he would "take it from here." CP 415.

The detective booked Mr. Danforth into jail. CP 311, 394. The next day, he interviewed Mr. Danforth again. CP 395-407. The detective asked Mr. Danforth why he had come to the Regional Justice Center the day before, and Mr. Danforth answered that he had done so because he had had thoughts of going to the arcade and rubbing up against boys. CP 397-98. Mr. Danforth said that community-based counseling does not work and that he wanted to be in a facility. CP 398.

The detective asked Mr. Danforth to reiterate what he would do if the mental health professionals could not help him. CP 399. Mr. Danforth responded, "I would uh, find someone and, standing up, uh, using one of the uh, video arcade games, groom the person by rubbing myself on them." CP 399. The detective asked Mr. Danforth what he would do if the boy liked it, and Mr. Danforth stated, "Well, I prob'ly would go the rest o' the way, not even considering the consequences." CP 401. He clarified that "the rest of the way" meant sexual intercourse. He concluded, "So therefore I wanted to come down and be committed so I don't offend anymore." CP 406. Mr. Danforth also told the detective that he had been receiving harassing telephone calls recently. CP 405.

The State filed a petition seeking Mr. Danforth's commitment as a sexually violent predator, alleging that Mr. Danforth's statements to the King County Sheriff's detective and mental health professionals on October 25th and 26th constituted a recent overt act. CP 1-46. On October 31, 2006, Mr. Danforth was transferred to the Special Commitment Center ("SCC") to await trial. CP 383. After Mr. Danforth had been there for a few months, Dr. Charles Lund, who interviewed him in 2002, interviewed him again. Mr. Danforth told Dr. Lund that he had "no desire related to boys under

21." CP 354. He also stated, "I don't have the desire to harm victims." CP 354.

Mr. Danforth explained that he requested commitment because he just "needed a temporary place of refuge from harassment from the community." CP 374. He made clear that his statements at the Sheriff's Office were "a cry for help." CP 373. He had no real intention of going to an arcade and rubbing up against boys, but told the detective he would because he wanted to be placed somewhere where he would be free of persecution. CP 383. He said, "I wouldn't be here now if other people would have helped me." CP 374. He was upset that the mental health professionals he spoke with at the Sheriff's Office declined to help him enter a mental health facility. CP 383-84. He did not want to stay at SCC, where he was raped and taunted. CP 378.

Mr. Danforth's attorneys filed a motion for summary judgment, asking the court to rule as a matter of law that Mr. Danforth's statements at the Regional Justice Center did not constitute a recent overt act. CP 60-84. Citing due process and the First Amendment, Mr. Danforth argued that "words alone, absent any act, in light of his many years in the community without

sexually acting out against children, cannot constitute a recent overt act under a constitutional application of the statute." CP 188.

The court denied the motion for summary judgment, and found that Mr. Danforth's statements on October 25 and 26, 2006 to the King County Sheriff and the mental health professionals "constitute a recent overt act as that term is defined in RCW 71.09.020." CP 293, 420-21. Mr. Danforth then waived his right to a jury trial and stipulated that he is a sexually violent predator. CP 286-95. Mr. Danforth preserved his right to appeal the court's order denying his motion for summary judgment, and to withdraw the stipulation in the event the trial court's ruling on the recent overt act issue is reversed. CP 288.

E. ARGUMENT

AS A MATTER OF LAW, MR. DANFORTH DID NOT COMMIT A RECENT OVERT ACT.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Anica v. Wal-Mart Stores, Inc., 120 Wn. App. 481, 84 P.3d 1231 (2004). This Court reviews a trial court's denial of a motion for summary judgment *de novo.* Crane & Assoc. v. Felice, 74 Wn. App. 769, 875 P.2d 705 (1994).

a. Due Process requires the State to prove a "recent overt act" before an individual may be committed as a sexually violent predator. Civil commitment is a "massive curtailment of liberty." In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)). A law that abridges a fundamental right such as liberty comports with due process only if it furthers a compelling government interest and is narrowly tailored to further that interest. U.S. Const. amend. XIV; In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). To satisfy the narrow-tailoring requirement, the State must prove that a respondent is both mentally ill and dangerous before committing him. In re Detention of Young, 122 Wn.2d 1, 37, 857 P.2d 989 (1993). The dangerousness must be current. Albrecht, 147 Wn.2d at 7.

Because predicting dangerousness is an inexact science, courts must be especially vigilant in protecting against improper commitment. Harris, 98 Wn.2d at 281. Otherwise SVP proceedings risk becoming "an Orwellian dangerousness court." Young, 122 Wn.2d at 60 (C. Johnson, J., dissenting). This slippery slope must be prevented by "requiring demonstration of a substantial risk of danger and by imposing procedural safeguards

and a heavy burden of proof." Harris, 98 Wn.2d at 281. Where, as here, the respondent has been living in the community, the substantial risk of danger must be evidenced by a "recent overt act." Id. at 284 (reading "recent overt act" requirement into RCW 71.05.020); Young, 122 Wn.2d at 41-42 (reading "recent overt act" requirement into RCW 71.09.030); Laws of 1995, ch. 216, § 3 (amending SVP statute to incorporate the requirement).

In Harris and Young, the supreme court defined what type of "recent overt act" the State must prove in order to subject an individual to civil commitment consistent with due process. The Court held the State must prove an "act" which "has caused harm or creates a reasonable apprehension of dangerousness." Harris, 98 Wn.2d at 284-85; Young, 122 Wn.2d at 40. The Legislature subsequently amended the relevant statutes to conform to this definition, requiring the State to prove "any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm." Laws of 1995, ch. 216, § 1.

In 2001, the Legislature again amended the statute, expanding the definition of "recent overt act" to include not only acts, but also "threats":

> "Recent overt act" means any act *or threat* that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

Laws of 2001, ch. 286, § 4; RCW 71.09.020(10) (emphasis added). Other than Mr. Danforth, nobody in Washington has been committed based on mere statements under the "threat" prong of the statute, and no court has held that the expanded definition of "recent overt act" comports with due process. See In re Detention of Lewis, 163 Wn.2d 188, 203, 177 P.3d 708 (2008) (Sanders, J., concurring).

b. Mr. Danforth's statements do not constitute a "threat" within the meaning of the statute. "The primary purpose of statutory construction is to give effect to the legislature's intent." City of Bellevue v. E. Bellevue Cmty. Council, 138 Wn.2d 937, 944, 983 P.2d 602 (1999). Legislative intent is determined mainly from the language of the statute itself. Id. If the language of a statute is plain and clear, the court must apply the language as written. In re Personal Restraint of Sappenfield, 138 Wn.2d 588, 591, 980 P.2d 1271 (1999). Because of the significant liberty interest at stake, civil commitment statutes must be strictly construed. In re

Detention of LaBelle, 107 Wn.2d 196, 205, 728 P.2d 138 (1986); In re Detention of Davis, 109 Wn. App. 734, 742, 37 P.3d 325 (2002).

Although the word "threat" is now a part of the "recent overt act" definition in the SVP statute, "threat" itself is not separately defined. Where a statute does not define a word, courts discern its ordinary meaning from the dictionary. Harry v. Buse Timber & Sales, Inc., ___ Wn.2d ___, 201 P.3d 1011, 1019 (2009). The dictionary defines "threat" as an "expression of *an intention to inflict loss or harm* on another." Webster's Third New International Dictionary at 2382 (2002) (emphasis added); see also In re Detention of Anderson, 134 Wn. App. 309, 326, 139 P.3d 396 (2006) (Armstrong, J., dissenting) ("standing alone, a sexual fantasy does not comprise a threat of harm to another").

Mr. Danforth's statements were not threats under the plain meaning of the word, because he specifically intended *not* to harm anyone. He told the detective and mental health professionals that he wanted their help *in order to avoid* harming others. This is not a recent overt act. As Judge Armstrong explained:

> [I]n every case where we found sufficient evidence of a recent overt act, ... the offender either (1) harmed another person sexually by committing a sex offense, ..., or (2) threatened sexual harm by expressing and

> taking some act to further his intent to victimize another person.

Anderson, 134 Wn. App. at 327-28 (Armstrong, J., dissenting) (citations omitted). Mr. Danforth did not commit a sex offense, did not express an intent to victimize another person, and did not take some act to further an intent to victimize another person. Instead, he intended to *avoid* victimizing another person and took an act (seeking help from the State) to further his intent to *avoid* victimizing someone. Because Mr. Danforth's stated intent was to prevent harm, not to cause harm, his statements do not constitute a threat within the plain meaning of the statute.

Even if the definition of the word "threat" were ambiguous, policy considerations would dictate that Mr. Danforth's statements do not constitute a recent overt act.[2] Our society should encourage former sex offenders to seek help if they fear they might commit new crimes. Providing help in the form of voluntary inpatient treatment under RCW 71.05.050 or other options like group homes would be an appropriate response to a request for assistance. If a

[2] A review of legislative history is not be helpful. The Legislature's primary concern in enacting the 2001 amendments was to address issues relating to less restrictive alternatives ("LRAs"). Senate Bill Report, SB 5122. The Bill Reports discuss the reasons for changing the LRA portions of the statute, but do not explain the reasons behind the addition of the word "threat" to the "recent overt act" definition. Id.

person knows that the State will petition for his commitment as a sexually violent predator if he asks for help, then there is an incentive *not* to come forward and instead risk reoffending. The Legislature could not have intended this result.

Furthermore, construing Mr. Danforth's statements to constitute a recent overt act would violate the narrow-tailoring requirement of due process. In order to pass strict scrutiny, a civil-commitment statute must require "proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); see also Kansas v. Hendricks, 521 U.S. 346, 357, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (States may, in certain narrow circumstances, provide for the forcible civil detainment of people who are "*unable to control* their behavior and who thereby pose a danger to the public health and safety"). Washington's recent overt act element – as it has been applied to other respondents – comports with this requirement. But the Legislature may not "broaden[] or attempt[] to dilute the recent overt act constitutional requirement." Lewis, 163 Wn.2d at 203 (Sanders, J., concurring). The statute would be unconstitutional if extended to Mr. Danforth's statements, because Mr. Danforth *did* control his

behavior. Indeed, he did exactly what we should be encouraging former sex offenders to do: he sought help *before* losing control.

Even the State's attorney and psychologist did not perceive Mr. Danforth's statements as threats, but rather as a request for help. Dr. Charles Lund described the exchange as follows: "I received a telephone call from [the prosecutor] on 10/25/06 regarding Mr. Danforth advising me that Danforth had been involved in an incident in which he contacted law enforcement and reported he was having urges to reoffend and was requesting some kind of intervention to assist him." CP 310, 371. Their later description of the statements as threats is therefore suspect.

Viewed in the context of Mr. Danforth's history, it is clear that his statements were cries for help rather than threats. See In re Detention of Broten, 130 Wn. App. 326, 335, 122 P.3d 942 (2005) (respondent's history during release is relevant to recent overt act determination); RCW 71.09.020(10) (whether threat creates reasonable apprehension of harm must be viewed from point of view of "objective person who knows of the history and mental condition of the person engaging in the act"). Mr. Danforth called the prosecutor's office with similar statements in 2002, saying he lacked control and was afraid of victimizing someone else soon.

CP 318, 365. He said he thought about committing a crime if papers were not filed to commit him and that "it would be unwise not to put him in a facility." CP 318, 365. But when the authorities declined to commit him or otherwise help him, Mr. Danforth returned to the community and remained crime-free, as he had since 1996.

As far back as 1987, Mr. Danforth sought refuge in the criminal justice system when he had trouble caring for himself. The prosecutor and Dr. Lund noted that on August 5, 1987, "Danforth came to speak to an officer and reported that he wanted to confess to anything that the officer would write up so that he would be incarcerated." CP 332, 359. Mr. Danforth has always been subjected to taunts due to his minor mental retardation, and he recently explained to Dr. Lund that he just "needed a temporary place of refuge from harassment from the community." CP 374.

Mr. Danforth's requests for assistance do not constitute a threat of any kind, let alone a threat that would rise to the level of a recent overt act. The order denying summary judgment should be reversed. The Court need not reach the alternative arguments below.

c. Unless limited to true threats, the statutory amendment extending the definition of "recent overt act" to encompass threats is unconstitutionally overbroad. The First Amendment prohibits laws abridging the freedom of speech. U.S. Const. amend. I. "A statute is presumptively inconsistent with the First Amendment if it imposes a ... burden on speakers because of the content of their speech." Bellevue v. Lorang, 140 Wn.2d 19, 24, 992 P.2d 496 (2000) (citation omitted). A statute is overbroad if its prohibitions extend beyond proper bounds and violate the First Amendment's protection of free speech. Lorang, 140 Wn.2d at 26. Speech will be protected "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." State v. Williams, 144 Wn.2d 197, 206, 26 P.3d 890 (2001) (citations omitted).

Although the legislature may sanction threats, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). A "true threat," which the government may proscribe, is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of *intention*

to inflict bodily harm upon or take the life of another individual." Williams, 144 Wn.2d at 207-08. The State may not prohibit or sanction threats that do not meet this definition. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). Statutes proscribing threats must be construed as limited to true threats in order to avoid invalidation on overbreadth grounds under the First Amendment. State v. Johnston, 156 Wn.2d 355, 359, 127 P.3d 707 (2006). Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Id. at 44.

Mr. Danforth's statements do not constitute a true threat. As discussed above, he did not express an intention to inflict bodily harm, but instead expressed an intention to avoid inflicting bodily harm. He asked the detective and mental health professionals to help him *so that he would not* harm others. His conditional statement that he would go to an arcade and rub up against teenaged boys if the counselors did not help him is protected speech, not a true threat. See Watts, 394 U.S. at 706, 708 (conditional statement "if they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." was not a true threat). Indeed, many statements far more chilling than Mr. Danforth's have been held protected speech rather than true threats. See, e.g.,

NAACP v. Claiborne Hardware, 458 U.S. 886, 902, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) ("If we catch any of you going in any of them racist stores, we're gonna break your damn neck"); Kilburn, 151 Wn.2d at 39 ("I'm going to bring a gun to school tomorrow and shoot everyone and start with you").

Furthermore, Mr. Danforth later explained to Dr. Lund that he made up his dangerousness story in order to be removed from his neighborhood harassers. This explanation is consistent with his history of requesting incarceration in 1987 and commitment in 2002. As our supreme court explained in Kilburn, this type of history and context must be considered in evaluating whether a statement is a true threat. Kilburn, 151 Wn.2d at 52-53.

In sum, the "threat" prong of the "recent overt act" definition is unconstitutionally overbroad unless limited to true threats. So limited, the statute does not apply to Mr. Danforth's statements, and the order denying summary judgment should be reversed.

d. If the "threat" prong of the recent overt act statute can be applied to Mr. Danforth's statements, the statute is unconstitutionally vague. A statute is void for vagueness under the Due Process Clause if it either (1) does not define its terms with sufficient definiteness that ordinary people can understand what

conduct is proscribed, or (2) does not provide ascertainable standards to protect against arbitrary enforcement. Lorang, 140 Wn.2d at 30. Courts are "especially cautious in the interpretation of vague statutes when First Amendment interests are implicated." Id. at 31.

If the definition of "recent overt act" can be applied to Mr. Danforth's request for help, then it is unconstitutionally vague. The word "threat" does not give notice that requests for help will constitute grounds for an SVP commitment petition.

In the trial court, the State asserted that Division Three's opinion in In re Detention of Albrecht, 129 Wn. App. 243, 118 P.3d 909 (2005) ("Albrecht II") forecloses a vagueness challenge. To the contrary, the reasoning of Albrecht II supports Mr. Danforth's argument. In that case, the State alleged that the respondent committed a recent overt act when he grabbed a 13-year-old boy and offered him 50 cents to follow him. Id. at 249-50. The respondent argued that the words "reasonable apprehension" were vague and violated due process. Id. at 253. Division Three rejected that argument, because, as explained in subsection (a) above, the language came directly from Harris and Young. Id.

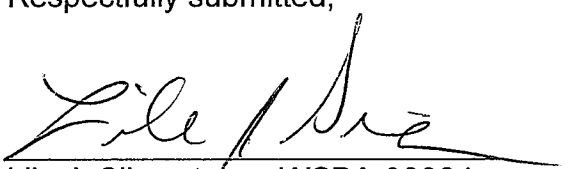
But the word "threat" did *not* come from Harris and Young. It was added later, and has not yet been subjected to a constitutional challenge. See Lewis, 163 Wn.2d at 203 (Sanders, J., concurring). Unlike the argument in Albrecht II, Mr. Danforth's vagueness challenge implicates both due process and the First Amendment, and is therefore subject to greater scrutiny. Compare Albrecht II, 129 Wn. App. at 254, with Lorang, 140 Wn.2d at 31. The statute as amended in 2001 does not provide adequate notice that an individual may be subject to commitment as a sexually violent predator if he seeks help to avoid reoffending. Thus, if the new definition of "recent overt act" extends to Mr. Danforth's statements, it is unconstitutionally vague. For this reason, too, the order denying summary judgment should be reversed.

F. CONCLUSION

For the reasons set forth above, Mr. Danforth respectfully requests that this Court reverse the trial court denying summary judgment and dismiss the petition with prejudice.

DATED this 13th day of May, 2009.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE THE DETENTION OF	)	
	)	
ROBERT DANFORTH,	)	NO. 61967-5-I
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MAY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY SVP UNIT KING COUNTY ADMINISTRATION BLDG. 500 FOURTH AVENUE, 9TH FLR SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ROBERT DANFORTH DSHS SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF MAY, 2009.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711